SUPREME COURT OF THE UNITED STATES.

No. 19.

DECEMBER TERM, 1868.

AMOS AND JOHN E. KENDALL, APPELLANTS,

vs.

THE UNITED STATES, APPELLEES.

APPEAL FROM COURT OF CLAIMS.

Brief for Appellees.

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THE CASE.

The facts in this case, as found by the Court of Claims, are briefly as follows: On April 9, 1842, the "Western Cherokees," claiming to have a large sum due them from the United States, for wrongs done them in violation of the guaranties of treaties, appointed a delegation to come to Washington and confer with the President; said delegation being invested with power to effect an arrangement and final adjustment of the affairs of the said Cherokees with the United States, and "to employ and pay counsel to aid and assist them in accomplishing the purposes of their appointment." On July 12, 1843, an agreement was entered into between the delegation so appointed and the appellants, by which it was stipulated that the appellants should act as counsel for the Indians in the prosecution of their claims, and the delegates agreed to pay their said counsel a commission of five per centum on "any sum or sums of money, or whatever else of value may be allowed and appropriated in full or in part satisfaction of said claims, to be paid from time to time as appropriated or allowed; and in which agreement it was provided that this commission was "to be received directly from the United States, without any fur-

ther act or authority by or from the said Cherokees west." The appellants acted under this agreement, and were recognized by the officers of the several departments of the government as attorneys and agents for the said Western Cherokees. The claims referred to were finally adjusted by and under the provisions of the treaty with the Cherokees of Aug. 6, 1846. On the 14th of August, 1846, the delegates of the Western Cherokees made an endorsement upon the agreement above referred to authorizing and requesting the Secretary of War to pay the commission therein stipulated to be paid, "out of any moneys which may be appropriated to pay the debts of the Old Settlers, or out of any moneys which may be found due to them under the said treaty." On the 30th September, 1850, Congress appropriated $887,480 15 in satisfaction of the claims of the Western Cherokees, with a proviso in the act of appropriation, "That in no case shall any money hereby appropriated be paid to any agent of said Indians, or any other person or persons other than the Indian or Indians to whom it is due." The money so appropriated was paid to the said Cherokee Indians, *per capita*, except $67,940 retained by the department to pay claims against them. The agreement between the Indian delegates and the appellants with the endorsement thereon above referred to, was communicated to the Indian Bureau, and reported to Congress on the 9th day of February, 1849.

The Court of Claims ruled that the claimants were not entitled to any relief, and that their petition should be dismissed; and the error assigned by the appellants is, "that upon the facts so found by the court they are entitled to recover from the United States five per cent. or one-twentieth of the moneys appropriated in satisfaction of the said claims of the said Western Cherokee Indians, by virtue of said written agreement, dated on the 12th of July, 1843, and the order endorsed thereon and dated the 14th of August, 1846."

POINTS.

I. *The pretended assignment by the Indians of a portion of their claim could not, if valid, be enforced in a court of law.* (*Mandeville* v. *Welch*, 5 Wheat. R., p. 286. *Tiernan et al.* v. *Jackson*, 5 Peters' R., p. 597.)

In the former of these cases, Mr. Justice STORY, in delivering the opinion of the court, says: "In cases where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and after notice to the drawee, it binds the funds in his hands; but where the order is drawn either on a general or a particular fund, for a part only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft." And in the last case, the same learned judge, in delivering the opinion of the court, says: "The general principle of law is, that choses in action are not at law assignable; but, if assigned, and the debtor promise to pay the debt of the assignee, the latter may maintain an action against the

debtor, as money received to his use. Independently of said promise, there is no pretence that an action can be sustained."

The Court of Claims has no equity jurisdiction.

Act of Feb'y 24, 1855, X *Stat. at Large*, p. 612.
" *Mar.* 3, 1863, XII " " p. 765.
United States v. *Alire.* (6 Wal., p. 575.)

II. *The assignment to appellants is not valid, unless recognized to be so by the United States.*

The Cherokee Nation v. *The State of Georgia.* (5 *Peters, p.* 16.)
Opinions Att'y Gen., VI, p. 49. (Pottowatomie contracts.)
" " " VII, p. 166. (R. W. Thompson's case.)

In the case of the Cherokee Nation, Chief Justice Marshall briefly defined the relations which the Indian tribes bear to the United States. He said: "They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. *Their relation to the United States resembles that of a ward to his guardian.* They look to our government for protection; rely upon its kindness and power; appeal to it for relief to their wants; and address the President as their Great Father."

The conduct of our government toward the Indians, and the whole course of its legislation in regard to them, indicate that we assume and exercise a power over them and in respect to all their affairs which has no limitations except those prescribed by the federal Constitution. There is nothing in this case tending to show any other policy than this; and public history shows that from the foundation of our government this has been our policy towards this people. We have assumed, and still do assume, absolute control over all kinds of business intercourse between them and the whites. And from this long established and well-known policy, as stated by Mr Attorney General CUSHING, in Thompson's case, "it follows, of course, as an administrative axiom, that no external contracts of theirs are executable, save with the approbation and assent, express or implied, of the government." "If," continues the Attorney General, "by any act having due form, they appoint a sum of money to be paid to an individual citizen of the United States, that appointment, when made by the Indian Nation, will be ratified and respected by the government or not, according as it shall appear to have been made fairly and for good considerations, and without duress or covin as against the Indians. *It is executable or voidable at will by the government.*"

In this case the appellants' complaint is, that the government has rendered void the agreement entered into between them and the Indians. The action is not brought to subject funds of the Indians in the hands of the government to the payment of the appellants' claim; but to recover from the government money out of which they (the

appellants) have been defrauded by the action of the government in disregarding the assignment of the Indians.

It is needless to say that the policy of the government, in its management of the Indian tribes, is not a matter to be revised by the Court of Claims.

III. The treaty of 1846, *and the act of* 1850, *prohibited the payment of this claim.*

Treaty with the Cherookees, IX Stat. at Large, 871.
Indian appropriation act, IX Stat. at Large, 544.

Art. V of the treaty, as presented for the consent of the Senate to its ratification, (Stat. at Large IX, 874,) stipulated that the money found due the Western Cherokees should "be held in trust by the government of the United States, and paid out to each individual belonging to that party, or head of family, or his legal representatives, *first deducting therefrom the sum of fifty thousand dollars to be paid to the delegation of that portion of the Cherokee people who are parties to the treaty, to defray the expenses of prosecuting their claims against the government of the United States, including the late Captain John Rogers.* And it is further agreed that the *per capita* allowance, to be paid as aforesaid, shall not be assignable, but shall be paid directly to the person entitled to it, or to his heirs or legal representatives, by the agent of the United States authorized to make such payments."

The Senate consented to ratify the treaty with an amendment striking out the words in italics as above, thus leaving the whole amount payable to these Indians under the treaty to be "paid out to each individual belonging to that party." This was on the 8th day of August, 1846; and on the 13th—five days afterward—the Indians gave their "free and voluntary assent" to the amendment. The treaty thus amended was duly ratified and proclaimed, and became law.

The appellants were acting as counsel for the Indians at the time this assent, "free and voluntary," was given to the Senate amendment. They must have known all about it; in fact they must have been parties to it. Did they then interpose an objection? Did they then notify the government that they had an assignment of one-twentieth part of whatever might be found due the Western Cherokees under the treaty, and insist upon their rights? It does not appear that they did. In fact it appears upon the record that although this assignment or agreement had been in the hands of the appellants from the 12th day of July, 1843, it was first brought to the attention of the officers of the government on the 9th day of February, 1849, *two years and a half after the action of the Senate on the treaty!*

For over four years after the ratification of the treaty the appellants had an opportunity to present their case to the government and to Congress; but after the expiration of this time, Congress, in appropriating the money found due under the treaty, provided "that in *no case* shall any money hereby appropriated be paid to any agent of

said Indians, or to *any other person* or *persons* than the Indian or Indians to whom it is due."

The appellants argue that neither this provision nor the fifth article of the treaty prohibited the department from paying their claim, and yet the fourth article of the treaty, which agrees to the payment to the Western Cherokees, provides that the money shall "be *distributed* per capita *to each individual of said party;*" and the original provision in the fifth article modifying this provision of the fourth article was stricken out by the Senate, with the "free and voluntary" consent of the Indians!

The repeated applications of the appellants to Congress for relief in the premises, and the repeated refusal of Congress to grant any relief, show conclusively that the appellants and Congress both understood that it was the intention of the treaty and of the act of appropriation to prohibit the payment of this claim.

The justice or injustice of this action of the government is not a matter for the consideration of the Court of Claims. The case of the appellants stands upon the legal effect of their agreement with the Indians; and there is surely nothing in this agreement which can override the deliberate action of the treaty-making power and the law-making power of the government.

T. LYLE DICKEY, *Ass't Att'y Gen'l.*

No. 19—2